Rule 27, Ariz. R. Crim. P.

RESPONSE TO "MOTION TO SET ASIDE VIOLATION/SENTENCING MEMORANDUM"

Under A.R.S. § 13-917(B), when the trial court finds that a defendant on intensive probation has committed a new felony offense, the court has no discretion and must revoke the defendant's probation. This is so even if the new offense has not been charged as a term 1 violation, and even if the new offense would be one for which probation would be mandatory under Proposition 200/A.R.S. § 13-901.01 if the defendant had been charged with and convicted of the substantive offense.

No independent corroboration of *corpus delicti* is required in a probation violation proceeding. A defendant's uncorroborated confession is sufficient evidence for the trial court to find that the defendant has violated his probation.

The State of Arizona, in response to the defendant's motion to set aside this Court's finding that the defendant violated term 9b of the terms and conditions of her probation, asks this Court to deny the motion, for the reasons set forth in the following Memorandum. In response to the defendant's request to declare the offense "a non-historical felony for sentencing enhancement purposes," the State recognizes that the probation violation is not a new felony conviction and does not act to enhance the sentence which this Court must impose for the drug sale offense for which the defendant is on intensive probation. However, the State contends that this Court must now revoke the defendant's probation and sentence her to prison, for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts:

On December 22, 2000, the court placed the defendant on probation for five years for possession of dangerous drugs for sale, a class 2 felony in violation of A.R.S.

§ 13-3407(A)(2). The first time she was found to have violated her probation, the court reinstated the defendant on intensive probation on April 5, 2001.

On April 25, 2002, the State filed a petition to revoke the defendant's probation, alleging, among other violations, that the defendant violated term 9b of her intensive probation by possessing or using methamphetamine on or about April 5, 2002 and April 13, 2002.

This Court held a probation violation hearing on June 19, 2002. The defendant's Adult Probation Officer Valerie Serpico and Surveillance Officer Matt Boatner both testified that the defendant had personally admitted to each of them that she had used methamphetamine on April 5 and April 13, 2002. The defendant says at page 2 of her Motion that "Mr. Boatner also testified that no urinalysis was performed." This is true, but misleading; he testified that when he talked to the defendant about having a urinalysis test performed, she told him that no urinalysis would be necessary – she would test positive since, as she admitted, she had used methamphetamine in violation of the terms of her probation.

The defendant did not testify at the hearing and presented no evidence. At the conclusion of the hearing, this Court found that the defendant had violated term 9b of her intensive probation and set the matter for a disposition hearing. The defendant now asks this Court to reverse itself and reinstate the defendant on probation.

II. LAW AND ARGUMENT

A. In probation violation proceedings, the defendant's confession, without more, is sufficient evidence to establish the violation, and no corroboration of the corpus delicti is needed.

Violations of probation, including intensive probation, must be established by a preponderance of the evidence. Rule 27.7(b)(3), Ariz. R. Crim. P. The defendant claims that this Court erred in finding that the State had met its burden of proof. First, the defendant contends that the State failed to present sufficient evidence to prove the "crime of possession or use of methamphetamine." But the defendant fails to recognize that this was not a criminal trial in which the State sought to prove a new substantive offense beyond a reasonable doubt. Rather, this was a probation violation hearing, and the State only had to establish a probation violation by a preponderance of the evidence. Therefore, the cases the defendant cites concerning the elements of the substantive crime of possession or use of methamphetamine are inapposite.

Second, the defendant claims that the State failed to meet its burden of proof because the State failed to present any proof that the defendant had possessed or used methamphetamine other than her "uncorroborated confession." She cites *State v. Daugherty*, 173 Ariz. 548, 550, 845 P.2d 474 (App. 1992) and other cases for the proposition that "A defendant may not be convicted solely on an out-of-court admission or confession."

However, none of the cited cases is applicable here because the hearing in question was not a trial on a new criminal charge, but a probation violation proceeding. And no independent evidence of the corpus delicti is required in a probation violation proceeding. *State v. Lay*, 26 Ariz. App. 64, 546 P.2d 41 (App. 1976). In *Lay*, the defendant's probation officer was the only witness at the violation hearing. The probation officer testified that the defendant had admitted to the probation officer that the defendant had been in possession of marijuana and had driven an automobile under

the influence of alcohol. In *Lay*, as in this case, the defendant denied the violations, but did not testify, did not present any evidence, and did not deny making the admissions to his probation officer. On appeal, the defendant argued that there was no independent evidence of the corpus delicti. The Court of Appeals stated:

> It is of course required in a criminal trial that a confession, before being usable against a defendant, must be corroborated by some independent evidence of the corpus delicti. *State v. Pineda*, 110 Ariz. 342, 519 P.2d 41 (1974). **This is not true in a probation revocation hearing, however.**

Id. at 65, 546 P.2d at 42 [emphasis added]. The Court of Appeals reasoned that a defendant's admission of his failure to abide by the terms of his probation was, without more, sufficient cause to revoke that probation, citing *State v. Ingles*, 110 Ariz. 295, 296, 518 P.2d 118, 119 (1974). Therefore, the State presented sufficient evidence to establish the probation violation, and this Court did not err in so finding.

B. Possession or use of methamphetamine is a felony offense despite the sentencing provisions of A.R.S. § 13-901.01. Under A.R.S. § 13-917(B), once this Court has found that the defendant committed a new felony offense, this Court has no discretion and must revoke the defendant's intensive probation.

1. Once this Court has found that the defendant has committed an additional felony offense – in this case, possession or use of methamphetamine – revocation of intensive probation is mandatory under A.R.S. § 13-917(B).

A.R.S. § 13-917(B) governs revocation of intensive probation. That subsection provides in part:

> If the person commits an additional offense or violates a condition of probation, the court may revoke intensive probation at any time before the expiration or termination of the period of intensive probation. **If a petition to revoke the period of intensive probation is filed and the court finds that the person has committed an additional felony offense** or has violated a condition of intensive probation which poses a serious threat or danger to the community, **the court *shall* revoke the period of**

> **intensive probation and impose a term of imprisonment** as authorized by law.

[Emphasis added.] Despite this seemingly-clear language, the defendant maintains that this language does *not* require this Court to revoke her probation. At page 11 of her motion, the defendant argues that the word "shall" here "should be construed as simply indicating a preference or even a desirability, but not as a mandate, in order to avoid absurd and potentially unconstitutional results." She further declares at page 13 of her motion that "the term 'additional felony offense' refers to only conduct for which the probationer has been charged and convicted." She even argues at pages 11-13, that the mandatory revocation language in this statute "violates the Eighth Amendment to the United States Constitution" and offends the evolving "standards of decency" and "contemporary values" in this country, citing numerous United States Supreme Court cases.

However, the defendant fails to cite either of the Arizona cases directly refuting her contentions, *State v. Taylor*, 187 Ariz. 567, 931 P.2d 1077 (App. 1996) or *State v. Smith*, 198 Ariz. 568, 12 P.3d 243 (App. 2000). The State submits that *Taylor* and *Smith* negate the defendant's arguments concerning the meaning and constitutionality of A.R.S. § 13-917(B).

In *Taylor*, the defendant was placed on intensive probation for attempted sale of a dangerous drug and for theft. Standard terms of intensive probation required him to refrain from using illegal drugs and submit to urinalysis testing. He tested positive for methamphetamine and eventually admitted to a probation officer that he was using that drug. The probation officer filed a petition to revoke his probation alleging a term nine violation. At the disposition hearing, the trial court concluded that A.R.S. § 13-917(B)

required the court to revoke the defendant's probation and did so. On appeal, the defendant argued that § 13-917(B) only applied when the State alleged a violation of term one, which requires probationers to obey all laws. The Court of Appeals reasoned that the statute "does not speak in terms of which condition is violated," but rather only requires a single criterion for revocation when a petition to revoke intensive probation is filed – that the court finds that the defendant has committed a felony. *State v. Taylor*, 187 Ariz. 567, 569, 931 P.2d 1077, 1079 (App. 1996). A defendant can violate term one by committing a misdemeanor, and a violation of other probationary terms, such as term nine, may constitute a felony. The Court concluded that the mandatory revocation provision of A.R.S. § 13-917(B) "applies regardless whether the petition to revoke intensive probation alleges a violation of standard condition one. Once a petition is filed, the statute requires revocation whenever the trial court finds that the defendant has committed a felony." *Id*. at 569-70, 931 P.2d at 1079-80.

The *Taylor* Court then said, "it is undisputed that the trial court found that defendant had committed a felony" because "The violation was based on the use of methamphetamine, a dangerous drug … which is a class 4 felony." *Id*. at 570, 931 P.2d at 1080. The Court concluded that A.R.S. § 13-917(B) "required the trial court to revoke defendant's intensive probations." *Id*.

The defendant in *Taylor* also claimed that it violated his due process rights "to revoke his probation based on a violation that was not alleged in the petition for revocation." *Id*. The Court disagreed, stating:

> Defendant's probations were revoked based upon his violation of standard condition 9, as alleged in the petition. Because the facts underlying the violation constituted a felony, revocation was mandatory.

> The revocation was therefore based upon the violation alleged in the petition.
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> Furthermore, the petition also alleged *how* defendant violated standard condition nine: by using methamphetamine. Defendant therefore had notice of the alleged violation and the conduct that was the basis of that violation. Accordingly, defendant was not denied due process.

Id. [emphasis in original]. The Court concluded:

> If, based upon the facts alleged in the petition and proven by the state, the trial court finds that a defendant has committed a felony offense, the legislature has required the revocation of that defendant's intensive probation and the imposition of a prison term. Any argument regarding the wisdom of this statute is therefore properly made before the legislature, not this court.

Id.

In *State v. Smith*, 198 Ariz. 568, 12 P.3d 234 (App. 2000), a case decided after Proposition 200/A.R.S. § 13-901.01 had been effect for some time, the defendant was convicted in 1996 of sale of dangerous drugs, a class 2 felony, and in 1997 he was placed on six years of intensive probation for that crime. Several petitions to revoke his probation were then filed, alleging, among other things, that he had violated the terms of his probation by using dangerous drugs. In 1999 the defendant pleaded guilty to two more counts of using dangerous drugs and also admitted that he had violated the terms of his intensive probation by committing the new felonies. At the sentencing hearing, the trial court refused to revoke the defendant's intensive probation and reinstated him on intensive probation, explaining that under A.R.S. § 13-901.01, "The populace of the state of Arizona has viewed that people with problems such as [the defendant's] should get treatment." *State v. Smith*, 198 Ariz. 568, 569, ¶ 4, 12 P.3d 243, 244 (App. 2000). The Court of Appeals reversed, holding that since the defendant was on intensive

probation for a crime not covered by A.R.S. § 13-901.01, that statute did not affect the mandatory incarceration provisions of § 13-917(B).

> The sale of dangerous drugs is explicitly excluded from the types of crimes to which § 13-901.01 applies. *See* A.R.S. § 13-901.01(B). Accordingly, Defendant's violation does not implicate § 13-901.01. Because the § 13-901.01 exceptions to mandatory incarceration do not apply to Defendant's violation, they do not override the explicit mandate of § 13-917(B). Accordingly, the trial court was required, as a matter of law, to sentence Defendant to prison.

State v. Smith, 198 Ariz. 568, 570, ¶ 10, 12 P.3d 243, 245 (App. 2000).

Taylor and *Smith* clearly and unequivocally state that under A.R.S. § 13-917(B) revocation is mandatory when the trial court finds that a defendant on intensive probation has committed a felony offense. Accordingly, the defendant's general arguments that "shall" in this statute might be considered permissive, rather than mandatory, cannot stand. Therefore, since possession or use of methamphetamine is a class 4 felony, and since this Court found that the defendant violated her probation by possessing or using methamphetamine, probation revocation is now mandatory.

> **2. *State v. Christian* held that convictions for felony-level offenses for which probation was mandatory under A.R.S. § 13-901.01 are "historical prior felony convictions" for purposes of sentence enhancement. And the reasoning and language of *Christian* suggest that such convictions are felonies for all purposes under Arizona law.**

Under *State v. Christian*, ___ Ariz. ___, 47 P.3d 666 (May 23, 2002) (corrected version[1], 2002 WL 1340897, issued June 18, 2002), the Arizona Court of Appeals held

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[1]The only change in the corrected version is in footnote 4 of ¶ 12, in which the erroneous citation to A.R.S. § 13-604(V)(1)(**a**) in the original is corrected to cite A.R.S. § 13-604(V)(1)(**c**).

that a conviction for which probation is mandatory under Proposition 200/A.R.S. § 13-901.01 is a historical prior felony conviction under A.R.S. § 13-604(V)(1)(c) if the offense was committed within the preceding five years. In *Christian*, the defendant had a prior conviction for drug possession. Under A.R.S. § 13-901.01/Proposition 200, probation was mandatory for that offense. The trial court held that a Proposition 200 conviction could not constitute a historical prior felony conviction for purposes of sentencing enhancement. The State appealed and the Court of Appeals vacated the sentence imposed and remanded the case for resentencing, stating:

> Because the prior offense was committed within the five years preceding the instant conviction, and because nothing in the language of either A.R.S. §§ 13-901.01 or 13-604(V)(1) precludes its use to enhance punishment of a subsequent conviction, the prior conviction qualifies as a historical prior felony conviction under subsection 13-604(V)(1)(c). Therefore, the trial court's ruling that defendant's prior drug conviction could not be used to enhance defendant's sentence was erroneous as a matter of law.

Christian, 47 P.3d at 669-70, ¶ 13 [footnote omitted].

The Court held in *Christian* that a Proposition 200 conviction may be used as a "historical prior felony conviction" if it meets the statutory requirements and time limits of A.R.S. § 13-604(V)(1)(c). *State v. Christian*, ___ Ariz. ___, ___, ¶ 13, 47 P.3d 666, 669-670 (App. 2002). And, by definition, every "historical prior felony conviction" must first be a "felony conviction" – that is, a conviction for a felony offense. Thus, the reasoning in *Christian* suggests that Proposition 200 offenses are felonies for all purposes of Arizona law.

The defendant recognizes that *Christian*'s holding conflicts with her position, but "urges this Court to make its ruling based on the language of the Honorable Judge Fidel" in his dissenting opinion. At pages 7-8 of her motion, the defendant quotes at

length from the dissent and concludes that because *Christian* did not consider all of the arguments she raises, "This Court should not consider possession of methamphetamine as a felony for the purpose of sending Defendant to prison."

But this Court cannot disregard *Christian*'s holding or choose to follow the dissent's reasoning. The majority opinion in *Christian* is the law and this Court must follow it. As soon as the Court of Appeals publishes an Opinion, the judges of the superior court must follow that Opinion.

"The superior court is bound by decisions of the court of appeals; its precedents furnish a proper guide to that court in making its decisions." *Francis v. Arizona Department of Transportation*, 192 Ariz. 269, 963 P.2d 1092 (App. 1998). In *Francis*, the trial judge issued a ruling involving the construction of a particular statute. The State filed a motion for reconsideration, noting that a recent Court of Appeals opinion had construed the statute in question differently. The trial court refused to follow the Court of Appeals decision. On appeal, the Court of Appeals found that the trial court judge was "clearly wrong in refusing to follow this court's decision." *Id*. at 271, ¶ 10, 963 P.2d at 1094. The Court said:

> The fact that a petition for review was pending before our supreme court at the time of the motion for reconsideration does not diminish [the new case's] significance as precedent. As to the trial court, [the new case] because binding precedent when it was published. It remains so until this court, in a published opinion, refuses to follow it or it is vacated by our supreme court. Whether [the new case] is to be disaffirmed is not a question for the superior court. A lower court cannot refuse to follow the rulings of a higher court. This would bring about a deadly conflict between the jurisdiction and power of the appellate courts and the superior courts of this state. Any other rule would lead to chaos in our judicial system.

Francis v. Arizona Department of Transportation, 192 Ariz. 269, 271, ¶ 11, 963 P.2d 1092, 1094 (App. 1998 [citations and internal quotation marks omitted]. Thus, the holding in *Christian* binds this Court.

3. The Ninth Circuit's decision in *United States v. Robles-Rodriguez* does not bind this Court.

This Court has found that the defendant violated her intensive probation by possessing or using methamphetamine. But the defendant argues at page 5 of her motion that because A.R.S. § 13-901.01 prohibits prison for a defendant's first and second drug possession or use offenses, "possession of methamphetamine is a crime for which [the defendant] could not be sent to prison." (The State notes that she does not say if or how many times she has been convicted of any such drug possession or use offenses.) From this, she argues that the offense this Court found she committed does not meet the definition of 'felony' under A.R.S. § 13-105 because that section defines "felony" as "an offense for which a sentence to a term of imprisonment in the state department of corrections is authorized by any law of this state." She concludes that her amphetamine possession or use in this case "should be declared a non-historical felony under Arizona's sentencing enhancement guidelines."

The State has had some difficulty directly addressing this particular argument because the defendant's statement of the issues is muddled in several ways.[2] As far as

[2] First, the statutory term is "historical prior felony conviction," not "historical felony." Second, this Court did not find that the defendant's possession or use of methamphetamine was a "felony conviction," but instead found that she had violated her intensive probation by committing a felony level offense. This Court's finding that the defendant violated her intensive probation was therefore not a "historical prior felony conviction." And, unlike the federal court system, Arizona's sentencing scheme does not have "sentencing guidelines." Finally, the sentencing enhancement statutes are not

the State can discern it, the defendant's actual argument is that this Court cannot find that she violated her probation by committing a felony offense because, if she had been charged with and convicted of that substantive offense, she could not have gone to prison for it.

Assuming this is the defendant's actual argument, she bases this argument in part on her own interpretation of A.R.S. §§ 13-105(16) and 13-901.01 and in part on the Ninth Circuit's decision in *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002), interpreting those statutes for purposes of federal sentencing guidelines. The State will address the *Robles-Rodriguez* argument first. That case held that for purposes of federal sentencing enhancement, the defendant's convictions for Proposition 200 offenses were neither "aggravated felonies" nor "other felonies." The Ninth Circuit stated:

> [E]ven assuming Arizona continues nominally to classify offenses affected by Proposition 200 as felonies, they are no longer felonies in substance. … Neither statutory text nor legislative history requires that we disregard Arizona's substantive policy judgment in favor of an outdated and meaningless label.

Id. at 905. The Ninth Circuit concluded that Robles-Rodriguez's prior Proposition 200 convictions "do not qualify as felonies."[3] *Id*. Because Robles-Rodriguez's Proposition 200 convictions were not felony convictions for purposes of federal sentencing, the

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involved here. The fact that the defendant has violated her intensive probation by committing a felony-level offense will not enhance the prison sentence this Court will eventually impose for the offense for which she was placed on intensive probation, sale of a dangerous drug.

[3] The Ninth Circuit did not give any indication whether that Court believed that the convictions were misdemeanors, petty offenses, or even crimes at all.

Ninth Circuit found that they did not warrant sentence enhancement under the Federal Sentencing Guidelines.

First, *Robles-Rodriguez* itself did not purport to decide whether, "notwithstanding Proposition 200, first- and second-time drug possession offenses are still considered felonies under Arizona law." *United States v. Robles-Rodriguez*, 281 P.3d 900, 902 (9th Cir. 2002). Since the Ninth Circuit did not even address the Arizona law issues, the Ninth Circuit's decision is limited to the federal sentencing context and cannot control this Court's decision.

Further, even if *Robles-Rodriguez* had addressed this issue, the Ninth Circuit's ruling would not bind the Arizona state courts. It is well established that that "the construction of state laws is the exclusive responsibility of the state courts." *In re One 1965 Ford Mustang*, 105 Ariz. 293, 300, 463 P.2d 827, 834 (1970), *quoting Speiser v. Randall*, 357 U.S. 513, 523 n. 7 (1958). It is for the Arizona courts, not the federal courts, to determine the proper construction of A.R.S. § 13-901.01 for purposes of Arizona law. Therefore, *Robles-Rodriguez* offers neither binding authority nor persuasive reasoning in determining whether convictions for offenses for which probation is mandatory under Proposition 200/A.R.S. § 13-901.01 are "felony offenses" for purposes of A.R.S. § 13-917(B).

4. The special sentencing provision found in A.R.S. § 13-901.01, barring imprisonment for first and second convictions for certain felony-level drug offenses, does not change such offenses from felonies into something else, despite the general definition of "felony" in § A.R.S. § 13-105(16).

The defendant correctly notes that A.R.S. § 13-105(16) states:

> "Felony" means an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.

From this, she argues that possession or use of methamphetamine is no longer a felony offense. She concludes that this Court could not have found that she violated her intensive probation by committing "an additional felony offense" under A.R.S. § 13-917(B).

The defendant's analysis is flawed. Under Arizona law, if a substantive offense subject to mandatory probation under A.R.S. § 13-901.01/Proposition 200 is classified as a felony, that offense remains a felony, and a conviction for that offense is a felony conviction. A review of the Arizona Revised Statutes will be instructive. A.R.S. § 13-601(A) provides that felonies are classified into six categories, from the highest, Class 1, down to Class 6 felonies. A.R.S. § 13-602(A) states that "The particular classification of each felony defined in this title is expressly designated in the section or chapter defining it." Specific Arizona statutes then designate drug offenses as particular categories of felony offenses. In particular, A.R.S. § 13-3407(A)(1) and (B)(1) make possession or use of methamphetamine a class 4 felony.

"The legislature determines what is a crime and what punishment may be exacted for its breach." *State v. Prentiss*, 163 Ariz. 81, 85, 786 P.2d 932, 935 (1989). "It is well settled that a legislature has broad, discretionary power to classify crimes and provide operative definitions for those crimes." *State v. Thompson*, 201 Ariz. 273, 276, ¶ 6, 34 P.3d 382, 385 (App. 2001). As the Arizona Supreme Court said in *Benitez v. Dunevant*, 198 Ariz. 90, 94, ¶ 10, 7 P.3d 99, 103 (2000), "As a matter of prudence, we will defer, where appropriate, to legislative standards of severity of an offense …. " Based on the will of the electors, the legislature has determined that certain drug crimes

do not warrant imprisonment even though they are felonies. Since the legislature has determined that these offenses are felonies, these offenses are still felonies and convictions for these offenses statutorily classified as felonies are still felony convictions, regardless of the special sentencing provisions imposed by A.R.S. § 13-901.01.

As the Arizona Supreme Court noted in *State v. Estrada*, 201 Ariz. 247, 249, ¶ 2, 34 P.3d 356, 358 (2001), Proposition 200 "substantially altered applicable **sentencing statutes** for drug offenders by mandating probation and treatment for the first and second offenses committed by nonviolent defendants." [Emphasis added.] It is clear from the legislative history, the language of the statutes involved, and the case law that Proposition 200 did not legalize or decriminalize drug possession – all it did was change the permissible penalty in the case of the defendant's first and second convictions for illegal personal possession or use of drugs. In other words, A.R.S. § 13-901.01 is purely a **sentencing statute** that applies only after the defendant has been found guilty and convicted of the substantive offense.[4] A.R.S. § 13-901.01 does not override or cancel the legislature's **classification of the offense as a felony** – it merely overrides the usual **sentencing options** for such felony offenses.

The general Arizona sentencing statutes include A.R.S. § 13-603(A), which provides, "Every person convicted of any offense defined in this title … shall be sentenced in accordance with this chapter and chapters 7, 8 and 9 of this title **unless**

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[4] Compare Rule 609(c), providing that a conviction may **not** be used for impeachment if the conviction has been the subject of a pardon or other procedure "based upon a finding of the rehabilitation of the person convicted" or "other equivalent procedure based on a finding of innocence."

otherwise provided by law." [Emphasis added.] A.R.S. § 13-702(C) states the presumptive terms of imprisonment for each category of felony from class 2 to class 6. In particular, the presumptive sentence for a class six felony, including possession of drug paraphernalia is one year, and for a class 4 felony, including possession of dangerous drugs, the presumptive sentence is two and one-half years. Then, A.R.S. §§ 13-604 *et seq*. provide for increasing and decreasing sentences from the presumptive term in certain circumstances.

Under the defense's reading of A.R.S. § 13-105(16), an offense is not a felony unless the court can actually impose a "term of imprisonment in the custody of the state department of corrections" for that offense. But note that the definition of "felony" in that subsection refers to an offense for which imprisonment is "**authorized by any law of this state.**" Arizona laws, as listed above, clearly authorize a year of imprisonment as the presumptive sentence for even the lowest classification of felony offense, class 6. The fact that a special sentencing provision mandates probation rather than incarceration for Proposition 200 offenses does not mean that Proposition 200 offenses classified by the legislature as felony offenses are no longer felonies.

This argument gains strength from the fact that the length of a defendant's probation under A.R.S. § 13-901.01 is determined according to A.R.S. § 13-902, entitled "Periods of probation." Under A.R.S. § 13-902(A)(3), a defendant convicted of a class 4 felony may be placed on probation for four years, while the longest possible period of probation for a misdemeanor offense is three years. A.R.S. § 13-901(A)(5). In *State v. Jones*, 196 Ariz. 306, 307, ¶ 2, 995 P.2d 742, 743 (App. 1999), a defendant was convicted of possession of narcotic drugs, a class 4 felony, in 1998, and the trial court

placed her on intensive probation for four years. If her offense were not in fact a felony, it would have been impossible for the trial court to place her on probation for four years. It is clear that the substantive drug possession offenses that were classified by statute as felonies before Proposition 200 remain felonies after Proposition 200 became effective, albeit felonies for which no incarceration is possible.

III. Conclusion

From the analysis set forth in this Response, it should be clear that the offense of possession or use of methamphetamine remains a class 4 felony. Therefore, when this Court found that the defendant had violated her intensive probation by possessing or using methamphetamine, this Court necessarily found that she had "committed an additional felony offense" under A.R.S. § 13-917(B). Accordingly, this Court must revoke the defendant's intensive probation and sentence her to prison for her underlying offense, possession of dangerous drugs for sale, a class 2 felony.